



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CLARENCE ROBERTS,
vs. Petitioner,
MIKE MCDONALD,
Respondent.

No. EDCV 10-873 AHM (FFM)
ORDER RE SUMMARY
DISMISSAL OF ACTION WITHOUT
PREJUDICE

On or about June 11, 2010, petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") herein. The Petition challenges a 2007 sentence imposed without his presence. Petitioner purports to state two grounds for relief: (1) sentencing petitioner in his absence violated his rights under the Sixth and Fourteenth Amendments; and (2) petitioner was denied effective assistance of counsel at his sentencing because (a) he was prevented from retaining private counsel; and (b) appointed counsel's performance was inadequate because he improperly purported to waive petitioner's right to be present at the sentencing without notifying petitioner and he failed to introduce relevant evidence at the sentencing.

Petitioner alleges that he has a petition for writ of habeas corpus currently pending before the California Supreme Court. (Petition at 4.) In a separately filed document, petitioner seeks a stay of this action while he pursues the state

1 habeas petition. (*See* Petitioner's Motion to Hold Federal Habeas Petition in
2 Abeyance.) In addition, petitioner alleges that he has not exhausted any of the
3 claims asserted in his federal petition. (*See id.* at 4.)

4 As a matter of comity, a federal court will not entertain a habeas corpus
5 petition unless the petitioner has exhausted the available state judicial remedies
6 on every ground presented in the petition. *Rose v. Lundy*, 455 U.S. 509, 518-22,
7 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). The habeas statute now explicitly
8 provides that a habeas petition brought by a person in state custody "shall not be
9 granted unless it appears that -- (A) the applicant has exhausted the remedies
10 available in the courts of the State; or (B)(i) there is an absence of available State
11 corrective process; or (ii) circumstances exist that render such process ineffective
12 to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). Moreover, if the
13 exhaustion requirement is to be waived, it must be waived expressly by the State,
14 through counsel. *See* 28 U.S.C. § 2254(b)(3).

15 Exhaustion requires that the prisoner's contentions be fairly presented to the
16 state courts, and be disposed of on the merits by the highest court of the state.
17 *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). A claim has not been
18 fairly presented unless the prisoner has described in the state court proceedings
19 both the operative facts and the federal legal theory on which his claim is based.
20 *See Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865
21 (1995); *Picard v. Connor*, 404 U.S. 270, 275-78, 92 S. Ct. 509, 30 L. Ed. 2d 438
22 (1971); *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996). A federal court may
23 raise the failure to exhaust issue *sua sponte* and may summarily dismiss on that
24 ground. *See Stone v. San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992);
25 *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981) (per curiam); *see also*
26 *Granberry v. Greer*, 481 U.S. 129, 134-35, 107 S. Ct. 1671, 95 L. Ed. 2d 119
27 (1987).

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Moreover, because petitioner alleged that he currently has a petition for review pending in the California Supreme Court, the exhaustion issue here also raises the Ninth Circuit's holding and reasoning in *Sherwood v. Tompkins*, 716 F.2d 632 (9th Cir. 1983). There, the petitioner was seeking habeas relief on the ground that he had been denied his right to appointed counsel and free transcripts. Although the petitioner's state appeal from his conviction still was pending, the petitioner arguably had exhausted his state remedies with respect to the particular claim being raised in his federal habeas petition. The Ninth Circuit held that the federal habeas petition nevertheless had to be dismissed for failure to exhaust state remedies:

"[E]ven were Sherwood to have exhausted all his state remedies with respect to the denial of his appointed counsel and free transcript request, that would not be enough to satisfy the requirements of 28 U.S.C. §§ 2254(b) and (c). When, as in the present case, an appeal of a state criminal conviction is pending, a would-be habeas corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even where the issue to be challenged in the writ of habeas corpus has been finally settled in the state courts.

"As we explained in *Davidson v. Klinger*, 411 F.2d 746, 747 (9th Cir. 1969), even if the federal constitutional question raised by the habeas corpus petitioner cannot be resolved in a pending state appeal, that appeal may result in the reversal of the petitioner's conviction on some other ground, thereby mooting the federal question."

Sherwood, 716 F.2d at 634 (footnote and remaining citations omitted).

Other courts in this Circuit also have applied the *Sherwood* dismissal rule where the petitioner had a state habeas petition pending. See, e.g., *Lockhart v. Hedgpeth*, 2008 WL 2260674, **1 (N.D. Cal. 2008); *Craft v. Sisko*, 2008 WL

1 906438, *1-*2 (C.D. Cal. 2008); *McDade v. Board of Corrections*, 2007 WL
2 3146736, *1 (N.D. Cal. 2007); *Hancock v. Marshall*, 2007 WL 1521002, *1
3 (N.D. Cal. 2007); *Kilgore v. Malfi*, 2007 WL 1471293, *2-*3 (N.D. Cal. 2007).

4 Petitioner has the burden of demonstrating that he has exhausted available
5 state remedies. *See, e.g., Brown v. Cuyler*, 669 F.2d 155, 158 (3d Cir. 1982).
6 Here, it plainly appears from the face of the Petition and the Motion to Hold
7 Federal Habeas Petition in Abeyance that petitioner cannot meet this burden with
8 respect to any of the claims being alleged by him.

9 If indeed it were clear that the California Supreme Court would hold that
10 petitioner's unexhausted federal constitutional claims were procedurally barred
11 under state law, then the exhaustion requirement would be satisfied.¹ *See Castille*
12 *v. Peoples*, 489 U.S. 346, 351-52, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989);
13 *Johnson v. Zenon*, 88 F.3d at 831; *Jennison v. Goldsmith*, 940 F.2d 1308, 1312
14 (9th Cir. 1991). However, it is not "clear" here that the California Supreme Court
15 will hold that petitioner's federal constitutional claims are procedurally barred
16 under state law. *See, e.g., In re Harris*, 5 Cal. 4th 813, 825 (1993) (granting
17 habeas relief where petitioner claimed sentencing error, even though the alleged
18 sentencing error could have been raised on direct appeal); *People v. Sorensen*,
19 111 Cal. App. 2d 404, 405 (1952) (noting that claims that fundamental
20 constitutional rights have been violated may be raised by state habeas petition).
21 The Court therefore concludes that this is not an appropriate case for invocation
22 of either the absence of available state corrective process exception or the

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24 ¹ In that event, although the exhaustion impediment to consideration of
25 petitioner's claim on the merits would be removed, federal habeas review of the
26 claim would still be barred unless petitioner could demonstrate "cause" for the
27 default and "actual prejudice" as a result of the alleged violation of federal law, or
28 demonstrate that failure to consider the claim would result in a "fundamental
miscarriage of justice." *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct.
2546, 115 L. Ed. 2d 640 (1991).

1 existence of circumstances that such process is ineffective exception to the
2 requirement that a petitioner's federal claims must first be fairly presented to and
3 disposed of on the merits by the state's highest court.

4 Petitioner has requested that this Court stay the instant Petition while he
5 pursues exhaustion. However, here the Petition is wholly unexhausted. A wholly
6 unexhausted petition cannot be stayed pending exhaustion but must be dismissed
7 without prejudice.² See, e.g., *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.
8 Ct. 2546, 115 L. Ed. 2d 640 (1991) (“[t]his Court has long held that a state
9 prisoner's federal habeas petition should be dismissed if the prisoner has not
10 exhausted available state remedies as to any of his federal claims”); see also
11 *Valerio v. Crawford*, 306 F.3d 742, 770 (9th Cir. 2002) (*en banc*); *Jiminez v.*
12 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (once respondent moved to dismiss,
13 district court was obliged to dismiss action, as petition contained no exhausted
14 claims).

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20 ² The Ninth Circuit has reaffirmed this holding, post-*Rhines*, in *Raspberry v.*
21 *Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006):

22 We decline to extend [the stay and abeyance] rule [of *Rhines*] to the
23 situation where the original habeas petition contained only
24 unexhausted claims, but the record shows that there were exhausted
25 claims that could have been included. Such an extension would result
26 in a heavy burden on the district court to determine whether a
27 petitioner who files a petition that on its face is unexhausted may
28 have other exhausted claims that could have been raised. Once a
district court determines that a habeas petition contains only
unexhausted claims, it need not inquire further as to the petitioner's
intentions. Instead, it may simply dismiss the habeas petition for
failure to exhaust.

1 IT THEREFORE IS ORDERED that this action be summarily dismissed
2 without prejudice, pursuant to Rule 4 of the Rules Governing Section 2254 Cases
3 in the United States District Courts.

4 LET JUDGEMENT BE ENTERED ACCORDINGLY.

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6 Dated:

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A. HOWARD MATZ
United States District Judge

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/S/ FREDERICK F. MUMM
FREDERICK F. MUMM
United States Magistrate Judge